1800 (2)

No. 10-1189

In The

Supreme Court of the United States

SEATTLE COLLISION CENTER, INC.;
TODD M. SULLIVAN AND KAREN SULLIVAN,

Petitioners,

v.

AMERICAN STATES INSURANCE COMPANY;
AND SAFECO INSURANCE COMPANY OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Ninth Circuit Court of Appeals correctly applied Washington law to affirm the district court's partial grant of summary judgment dismissing Petitioners' claims against Respondents, because the complaint underlying Petitioners' insurance coverage claim did not allege facts triggering a duty to defend or to indemnify under Washington law.

II. Whether the Ninth Circuit Court of Appeals correctly applied clear and unambiguous exclusionary language in Respondents' insurance policies, as construed under binding Washington State Supreme Court authority, to bar claims for insurance coverage asserted by Petitioners pursuant to Washington law.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondents American States Insurance Company and Safeco Insurance Company of America identify these parent corporations:

American States Insurance Company is a company organized under the laws of the State of Indiana and for federal court jurisdiction/diversity of citizenship disclosure purposes, the principal place of business is 175 Berkeley Street, Boston, Massachusetts.

- American States Insurance Company is wholly owned by Safeco Corporation.
- Liberty Mutual Agency Corporation owns 100% of the shares of Safeco Corporation.
- Liberty Mutual Agency Corporation is wholly owned by Liberty Insurance Holdings, Inc.
- Liberty Mutual Insurance Company owns 100% of the stock of Liberty Insurance Holdings, Inc.
- Liberty Mutual Group Inc. owns 100% of the stock of Liberty Mutual Insurance Company.
- LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc.
- Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 – Continued

Safeco Insurance Company of America is a company organized under the laws of the State of Washington and for federal court jurisdiction/diversity of citizenship disclosure purposes, the principal place of business is 175 Berkeley Street, Boston, Massachusetts.

- Liberty Mutual Agency Corporation owns 100% of the shares of Safeco Corporation.
- Liberty Mutual Agency Corporation is wholly owned by Liberty Insurance Holdings, Inc.
- Liberty Mutual Insurance Company owns 100% of the stock of Liberty Insurance Holdings, Inc.
- Liberty Mutual Group Inc. owns 100% of the stock of Liberty Mutual Insurance Company.
- LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc.
- Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. The *Erie* Doctrine Has No Bearing On SCC's Petition, Because The Lower Courts Correctly Articulated And Applied Washington Law	4
II. SCC Misconstrues Washington's Notice Pleading Standard And Confuses It With Washington's *Woo* Standard For Determining An Insurer's Duty To Defend	6
III. The Underlying Lawsuit Complaint Does Not Satisfy Washington's *Woo* Standard To Trigger A Duty To Defend Regardless Of Whether The Underlying Lawsuit Alleges Natural Resource Damages	10
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

American Best Food, Inc. v. Alea London, Ltd., 229 P.3d 693 (Wash. 2010) 9, 13

Ashcroft v. Iqbal, 556 U.S. ___, 129 S.Ct. 1937 (2009) 8

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 8

Champagne v. Thurston County, 178 P.3d 936 (Wash. 2008) 6, 7, 8, 9

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 4

Feed Store, Inc. v. Reliance Ins. Co., 774 S.W.2d 73 (Tex.App. – Houston 1989) 10

Halvorson v. Dahl, 574 P.2d 1190 (Wash. 1978) 8

Hanna v. Plumer, 380 U.S. 460 (1965) 5

Kent Farms, Inc. v. Zurich Ins. Co., 998 P.2d 292 (Wash. 2000) 10, 11

Leavitt v. Jane L., 518 U.S. 137 (1996) 5

McCurry v. Chevy Chase Bank, 233 P.3d 861 (Wash. 2010) 8, 9

Quadrant Corp. v. Am. States Ins. Co., 110 P.3d 733 (Wash. 2005) 10, 11

Salve Regina College v. Russell, 499 U.S. 225 (1991) 4

Woo v. Fireman's Fund Ins. Co., 164 P.3d 454 (Wash. 2007) 9

York Golf and Tennis Club v. Tudor Ins. Co., 845 A.2d 1173 (Me. 2004) 9

TABLE OF AUTHORITIES – Continued

Page

RULES

Wash. Super. Ct. Civ. R. 12(b)(6) 5, 8

Sup. Ct. R. 10 4

STATEMENT OF THE CASE

In October 2007, neighboring landowners sued Seattle Collision Center, Inc., Todd M. Sullivan and Karen Sullivan (hereinafter, collectively "SCC") in a Washington State court under Washington State's Model Toxic Control Act ("MTCA") ("Underlying Lawsuit"). Pet. App. at 38-47. The Underlying Lawsuit presented a MTCA "private right of action" claim for contribution and declaratory relief for past and future remedial action costs from SCC for alleged contamination of soils and groundwater caused by the release of volatile organic compounds, specifically the pollutant perchlorethylene ("PERC"). *Id.*

The Underlying Lawsuit complaint only mentions "natural resource damages" in paragraphs 28 and 29 and only in the context of quoting the MTCA statute upon which the Underlying Lawsuit claims for remedial action costs are based. Pet. App. at 44-45.[1] In both paragraphs, the sentence that immediately follows the MTCA citation makes it clear, however, that the alleged liability under MTCA was limited to "remedial action costs." *Id.* Further, the complaint only requests relief for past and future remedial action costs, although it includes the generic request for "such other relief as the court deems just." Pet. App. at 46-47. The complaint neither alleges liability nor requests relief for

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[1] Paragraph 29 is not even directed at SCC, but rather another defendant in the Underlying Lawsuit.

"natural resource damages." *See, generally,* Pet. App. at 38-47.

SCC first tendered defense and indemnity of the Underlying Lawsuit to Oregon Mutual Insurance Company ("OMI"). Pet. App. at 10. SCC subsequently tendered to the Respondents American States Insurance Company and Safeco Insurance Company of America (collectively, the "Safeco Insurers"). *Id.* The Safeco Insurers denied coverage because their six policies at issue each contained a pollution exclusion with exclusionary language barring coverage for pollution liability such as a PERC release. Pet. App. at 9-10.

In November 2008, OMI sued SCC in the Western District of Washington based on diversity jurisdiction, seeking a declaratory judgment that OMI had no insurance coverage obligations in relation to SCC's traditional pollution liability claim. Pet. App. at 11. SCC counterclaimed against OMI and filed a third-party complaint against the Safeco Insurers alleging Washington state law claims of breach of contract, negligence, insurance bad faith, and violations of Washington statutory law. *Id.*

In April 2009, the Safeco Insurers filed a motion for summary judgment dismissal of SCC's claims based on the Washington State Supreme Court's interpretation of the unambiguous policy language in each implicated policies' pollution exclusion. Pet. App. at 12. On September 18, 2009, the district court issued an Order dismissing the majority of SCC's

claims against the Safeco Insurers, including all insurance coverage claims. Pet. App. at 7 n.1. On October 28, 2009, the district court filed an Amended Order to correct a misstatement of Washington law. Pet. App. at 6-37. In the Amended Order, the district court ruled that the policies' pollution exclusions "clearly and unambiguously exclude coverage for the remediation claims" at issue. Pet. App. at 22. With respect to SCC's "hypothetical" non-remediation claims, the district court stated as follows:

> The court is not persuaded that the Underlying Complaint, even construed liberally, alleges a claim for natural resource damages or other, non-remediation claims. Nevertheless, the court need not resolve this issue because, even accepting Seattle Collision and the Sullivans's characterization of the Underlying Complaint, the modified absolute pollution exclusion clauses exclude coverage for any such non-remediation claims.

Pet. App. at 23. Concluding that no coverage existed under the Safeco Insurers' policies, the court dismissed the majority of SCC's claims. *See, generally*, Pet. App. at 6-37. The parties then stipulated to dismissal of SCC's limited remaining claims to facilitate SCC's appeal to the Ninth Circuit, which affirmed the disposition. Pet. App. at 4-5.

REASONS FOR DENYING THE PETITION

Despite Petitioners' efforts to wrap this case in the mantle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this matter involves a simple application of state substantive law to an insurance issue that does not merit consideration by this Court. Both the district court and court of appeals correctly articulated and applied binding Washington State Supreme Court precedent to dismiss insurance coverage claims that fall within the exclusionary language of an insurance policy. The case presents no federal question. Therefore, "compelling reasons" do not exist for this Court to grant the petition for a writ of certiorari. *See* Sup. Ct. R. 10. Furthermore, even a misapplication of Washington law would not merit review, because a petition for a writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

I. The *Erie* Doctrine Has No Bearing On SCC's Petition, Because The Lower Courts Correctly Articulated And Applied Washington Law.

Pursuant to the *Erie* Doctrine, a federal court sitting in diversity must apply the substantive law of the state. *E.g., Erie R. Co. v. Tompkins*, 304 U.S. at 79-80. *See also Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) (court of appeals considers the issues on appeal *de novo* without deference to the district court's determination of state law). Here, both

the district court and court of appeals did just that. They independently applied Washington state law to rule that SCC was not entitled to insurance coverage under the policies issued by the Safeco Insurers. Because the courts applied the substantive law of Washington, the lower court decisions are not in conflict with the *Erie* Doctrine.

As Petitioners point out, the *Erie* Doctrine is rooted in concepts of fairness, with its twin aims of "discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 457 (1965). However, the Safeco Insurers did not choose the forum for Petitioners' claims and the lower courts correctly applied state law to this diversity action. Therefore, fairness is not an issue.

This Court has stated it normally will not grant a petition for a writ of certiorari to review what purports to be a federal court's application of state law except for the "extraordinary circumstance" of blatant federal court nullification of state law. *See, e.g., Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). SCC's petition does not present such an "extraordinary circumstance." Rather, SCC's petition is fundamentally flawed for two primary reasons: (1) SCC misconstrues Washington's notice pleading standard required to withstand a Rule 12(b)(6) dismissal motion and confuses it with Washington's separate *Woo* standard for determining an insurer's duty to defend; and (2) the Underlying Lawsuit complaint does not

trigger a duty to defend regardless of the Washington standard as applied to this case.

II. SCC Misconstrues Washington's Notice Pleading Standard And Confuses It With Washington's *Woo* Standard For Determining An Insurer's Duty To Defend.

Contrary to SCC's characterization of Washington's notice pleading standard, a Washington complainant cannot obtain damages not pled simply on the basis of a boilerplate prayer "for such other relief as the Court deems just and equitable" at the end of a complaint. In *Champagne v. Thurston County*, 178 P.3d 936, 945-46 (Wash. 2008), the Washington State Supreme Court considered whether the plaintiff Champagne's complaint sufficiently pled claims under Washington's Minimum Wage Act ("MWA") and Wage Payment Act ("WPA"). The complaint alleged various causes of action based on Washington statutes violated by "Defendant Thurston County's action in failing to pay the due and payable wage payments" entitled to the plaintiff, including causes of action under the MWA and WPA. *Id.* at 946. Thus, the complaint made direct factual allegations regarding specific statutory violations that gave notice to Thurston County that plaintiff sought relief for such claims.

Champagne's prayer for relief did not expressly pray for damages based on MWA or WPA damages, but did include a prayer for other statutory remedies

as well as "such other relief as the Court deems just and equitable." *Id.* Noting that whether a complaint satisfies the notice pleading standard is factually driven, the court reasoned:

> The County argues persuasively that *a generic prayer for relief does not provide adequate notice to the opposing party of a particular remedy.* However, the entirety of Champagne's complaint supplies *direct allegations* sufficient to give notice to both the court and the County that Champagne sought relief under the MWA, WPA, and WRA.

Id. (emphasis added). The court held that "the totality of Champagne's complaint comports with notice pleading rules and that review of the causes of action under the MWA and WPA in addition to the WRA is appropriate." *Id.* Based on its conclusion that the complaint alleged direct allegations of fact to give notice on the MWA and WPA claims, the *Champagne* Court then analyzed the substantive statutory arguments presented to it on appeal.

SCC's petition presents a completely different issue. Here, the Underlying Lawsuit complaint mentions "natural resource damages" in paragraphs 28 and 29, but only in the context of quoting the statute upon which the Underlying Lawsuit's claim for remedial action costs is based. Pet. App. at 44-45. Those same paragraphs of the complaint make clear that the Underlying Lawsuit does not allege liability for natural resource damages, but rather only alleges

that the defendants "are therefore strictly liable . . . for all "remedial action costs." *Id.* SCC admits this. *See* Pet. at 16 ("SCC does not dispute that the complaint in the Underlying lawsuit [sic] does not *explicitly demand* natural resource damages") (emphasis in original). Thus, both parties agree that the Underlying Lawsuit complaint does not present the direct factual allegations required under *Champagne* to satisfy Washington's notice pleading standard for a natural resource damages claim.

McCurry v. Chevy Chase Bank, 233 P.3d 861, 862-64 (Wash. 2010), another case cited by Petitioners, follows the long-standing notice pleading standard articulated in *Champagne* and also requires direct factual allegations within the complaint to avoid a Rule 12(b)(6) dismissal. According to the *McCurry* Court, "Under CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if it is *possible* that facts could be established to support **the allegations in the complaint**." *McCurry*, 233 P.3d at 863 (italics in original, bold underscore added), *citing Halvorson v. Dahl*, 574 P.2d 1190 (Wash. 1978). As discussed, this standard has not been met in this case. Therefore, the pleading standard articulated in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), is not relevant to the issues presented by SCC's petition for a writ of certiorari.

More importantly, Washington's notice pleading standard is distinct from the separate question of whether an underlying lawsuit complaint triggers

insurance obligations under an insurance policy. Both *McCurry* and *Champagne* considered the issue of notice pleading sufficiency in the face of a motion to dismiss. At issue in this case is whether an Underlying Lawsuit complaint triggers a duty to defend. As to that issue, the rule in Washington is that an insurer must defend if the factual allegations in the complaint, if proven, would conceivably be covered. *American Best Food, Inc. v. Alea London, Ltd.*, 229 P.3d 693, 696 (Wash. 2010), *citing Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454 (Wash. 2007). The duty to defend an underlying lawsuit "'arises when a complaint against the insured, construed liberally, *alleges facts* which could, if proven, impose liability upon the insured within the policy's coverage.'" *Id.* (internal references omitted) (emphasis added).

Here, as discussed below, the Underlying Lawsuit complaint does not allege facts that, if proven, could impose liability upon the insured within the policies' coverage, whether for natural resource damages or otherwise. Therefore, SCC's petition is boldly asking this Court to anticipate whether a Washington court would hold that boilerplate language requesting "such other and further relief" as a Washington court deems just, without additional complaint allegations, creates a legal claim against which an insurer is required to defend. No Washington court has done so to date and, nationwide, the black letter rule is that such boilerplate language is insufficient to trigger insurance coverage obligations. *E.g., York Golf and Tennis Club v. Tudor Ins. Co.*, 845

A.2d 1173, 1177 n.1 (Me. 2004) ("a request for 'such other and further relief as the court may deem just and proper' . . . would not be enough to establish a duty to defend"); *Feed Store, Inc. v. Reliance Ins. Co.*, 774 S.W.2d 73, 74-75 (Tex.App. – Houston 1989) ("If the boilerplate conclusion in Dairy Queen's complaint encompasses a request for money damages, then we suppose every lawsuit ever filed also sought damages. And there would be no reason to confine the content of invisible allegations to damages. All lawsuits seeking "other and further relief" would precipitate a duty to defend.").

III. The Underlying Lawsuit Complaint Does Not Satisfy Washington's *Woo* Standard To Trigger A Duty To Defend Regardless Of Whether The Underlying Lawsuit Alleges Natural Resource Damages.

Under Washington law, SCC's traditional pollution liability claim is not covered by Respondents' policies. The Washington State Supreme Court recognizes that an absolute pollution exclusion bars coverage for pollution liability arising out of "traditional environmental harm." *See, e.g.*, *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733 (Wash. 2005); *Kent Farms, Inc. v. Zurich Ins. Co.*, 998 P.2d 292, 293 (Wash. 2000). As with the Safeco Insurers' policies here, the pollution exclusion language construed in both *Kent Farms* and *Quadrant* bars coverage for bodily injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal,

seepage, migration, release or escape of pollutants." Compare *Quadrant*, 110 P.3d at 736, and *Kent Farms*, 998 P.2d at 294, with Pet. App. at 56. The *Kent Farms* Court summarized the effect of this exclusionary language as follows:

> The exclusion, when viewed in the context of its purpose, does not apply merely because a potential pollutant was involved in the causal chain. Instead, the exclusion applies to "occurrences" involving the pollutant as a pollutant. Our approach is consonant with the understanding of the average purchaser of insurance and consistent with the provisions of the insurance policy as a whole; that is, the pollution exclusion clause was designed to exclude coverage for traditional environmental harms.

998 P.2d at 296. In short, the *Kent Farms* Court concluded that the exclusion was designed to preclude coverage in the case of traditional environmental harms or where the pollutant acted as a pollutant.[2]

SCC's coverage claim is exactly the type of claim to which the *Kent Farms* Court pointed when discussing the intent of such a pollution exclusion, because SCC only seeks coverage for liability due to traditional environmental harms. SCC does not dispute that

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[2] The *Quadrant* Court later clarified that the exclusion is even broader and "clearly applies to bodily injury and property damage; it is not limited to actions for cleanup costs." 110 P.3d at 741.

remedial action costs are not covered. *See*, *e.g.*, Pet. App. at 22 ("Here, the parties agree that the policies do not provide coverage for the remediation claims alleged by the Underlying Plaintiffs"). Regarding SCC's baseless contention that the Underlying Lawsuit complaint alleges natural resource damages, such damages still fall within the policies' definition of "property damage" as "physical injury to tangible property, including all resulting loss of use of that property." In fact, SCC strenuously argued and admitted this fact to the district court. *See* Pet. App. at 24-25 ("'Property damage' is a defined term under the insurance policies, and the parties agree that a claim for natural resource damages, whether or not actually asserted in the Underlying Complaint, constitutes a claim for "property damage" as characterized by Seattle Collision and the Sullivans."). Therefore, even if alleged by the Underlying Plaintiffs, natural resource damages would be excluded under the Safeco Insurers' pollution exclusions as "'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" *Id.*

In short, SCC claims liability coverage for MTCA remedial action costs (and arguably natural resource damages) relating to alleged property damage from contamination of groundwater and land by PERC. SCC not only cannot dispute but also has admitted the fact that its claim seeks coverage for property damage arising out of the release of a pollutant – in other words, traditional environmental harm. As a

result, and as the Ninth Circuit recognized, SCC's citation to *Alea*, 229 P.3d at 697-98, is misplaced, because no "legal uncertainty" exists as to how a Washington court construes the pollution exclusion language at issue in this case. Therefore, the absolute pollution exclusions contained in the Safeco Insurers' policies bar coverage for the claim, and the lower courts' rulings are grounded in solid Washington state law.

CONCLUSION

The petition fails to establish any justification for this Court to review the lower courts' rulings on state law questions brought under diversity jurisdiction. This case does not present a true federal question, a conflict among the circuits, or a conflict with this Court's precedent. Therefore, Respondents respectfully request that this Court deny SCC's petition for a writ of certiorari.

Respectfully submitted,

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